SUPREME COURT, U. S.

FILED
AUG 9 1969
JOHN F. DAVIS, CLERK

No. 453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CHARLES L. JOLLY,

Appellant,

vs.

MORGAN COUNTY JUNIOR COLLEGE DISTRICT, et al

Appellees.

On Appeal From The Supreme Court of Colorado

JURISDICTIONAL STATEMENT

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August 8, 1969

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No. ____

CHARLES L. JOLLY,

Appellant,

vs.

MORGAN COUNTY JUNIOR COLLEGE DISTRICT, et al

Appellees.

On Appeal From The Supreme Court of Colorado

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court in and for the County of Washington and State of Colorado has not been reported. The decision of the Supreme Court of Colorado is reported at 452 P.2d 34. Copies of these opinions are annexed hereto as appendices A and B respectively, at pp. 17 and 23 respectively.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *Nature of Proceeding.* Appellant, a taxpaying elector, residing within the junior college district brought an

action to contest its organization election and to obtain a declaratory judgment that Senate Bill 405, enacted by the First Regular Session of the Forty-Sixth General Assembly of the State of Colorado (now Article 35, Chapter 123, Colorado Revised Statutes, 1963, as amended), which created said junior college district, was unconstitutional. Copy of the Complaint wherein Appellant alleged that Senate Bill No. 405 contravenes Article XIV, Constitution of the United States, is annexed hereto as Appendix C, at page 31.

The trial court entered its Findings of Fact, Conclusions of Law and Decree under date of November 14, 1967, wherein it upheld the validity of the organization election, but held that Senate Bill 405 was unconstitutional as contravening Section 25, Article V, Constitution of Colorado, which prohibits enactment of a local or special law where a general law can be made applicable. Rationale of the trial court's decision was to the effect that a general law had already been enacted and, therefore, it could be made applicable. Appellees herein appealed to the Supreme Court of Colorado.

2. *Judgment To Be Reviewed.* The decision or judgment sought to be reviewed was rendered by the Supreme Court of Colorado under date of March 24, 1969, and it is embodied in Appendix B (post, p. 23). A petition for rehearing was denied by the Supreme Court of Colorado on April 14, 1969, at which time said decision became effective (appendix D, at page 42).

Notice of appeal to this Court was filed in the Supreme Court of Colorado on July 10, 1969.

3. *Statutory Jurisdiction.* The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. Section 1257 (2).

4. *Case Jurisdiction.* Cases believed to sustain the jurisdiction of this Court are *Dobbins* v. *City of Los An-*

geles, 25 S. Ct. 18, 195 U.S. 223, 49 L. Ed 169; *Douglass* v. *State of Alabama*, 85 S. Ct. 1074, 380 U.S. 415, 13 L. Ed 2d. 934; *Henry* v. *State of Mississippi*, 85 S. Ct. 564, 379 U.S. 443, 13 L. Ed. 2d. 408; *Angel* v. *Bullington*, 67 S. Ct. 657, 330 U.S. 183, 91 L. Ed. 832; *Carpenter* v. *Shaw*, 50 S. Ct. 121, 280 U.S. 363, 74 L. Ed. 478; *Hillsborough* v. *Cromwell*, 66 S. Ct. 445, 326 U.S. 620, 90 L. Ed. 358; *Great Lakes Steel Corp.* v. *Lafferty*, 12 F. Supp. 55, affirmed 57 S. Ct. 329, 300 U.S. 29, 81 L. Ed. 485.

5. *Constitutionality of Statute.* The basic statute involved is Senate Bill No. 405 (now Article 35, Chapter 123, Colorado Revised Statutes, 1963, as amended) which provides as follows:

> "Section 1. *Creation of Morgan county junior college district.*—(1) A junior college district, to be known and designated as the "Morgan county junior college district", is hereby created, subject to the approval thereof by the qualified taxpaying electors of the district, comprised of the territory specified in section 2 of this act.
>
> "(2) The objects of the Morgan county junior college district are to establish the Morgan county junior college, to be located in Morgan county, and to provide and offer educational programs to meet the occupational needs of youth and adults in technical and vocational fields and to provide two-year transfer educational programs to qualify students for admission to the junior year at colleges and universities.
>
> "Section 2. *Approval of qualified taxpaying electors required.*—Upon the effective date of this act, the county superintendent of schools of Morgan county shall forthwith give notice that the question of approving the organization of a junior college district, comprised of school district RE-20 in the counties of Morgan and Weld, school district RE-3, in the county

of Morgan, school district RE-2, in the counties of Morgan and Washington, school district RE-104, in the county of Washington, and school district RE-50 in the counties of Morgan, Weld, and Adams, will be submitted to a vote of the qualified taxpaying electors of said district within one hundred twenty days after the effective date of this act. The manner of giving said notice, the time of holding and the conduct of said election, and the election of the first junior college committee of the district, shall be in conformity with procedures prescribed for the organization of other junior college districts in article 23 of chapter 123, C.R.S. 1963, as amended, wherever applicable. If a majority of the qualified taxpaying electors of said district voting on the question shall vote in favor of the establishment of said junior college district, all other provisions of said article 23 of chapter 123, shall apply to the junior college district so established as apply to other junior college districts organized under said article.

"Section 3. *Safety clause.*—The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety."

QUESTIONS PRESENTED

1. Does the creation of a junior college district by local or special legislation, with taxing powers and its subsequent tax levy, where a general law was previously enacted and still effective, result in the imposition of unequal tax burdens on a taxpayer residing therein, in invidious discrimination, in a denial of equal protection of the laws, and in a denial of due process of law, particularly where there were no special evils with which the general law could not cope, where there was no public necessity for such local or special legislation, and where a second general statute created similar junior colleges

as state institutions, to be financed by the state, making the taxpaying resident in the local junior college district subject to double taxation to help support both his local and the state junior colleges, and when other citizens residing outside the junior college district could enjoy the same benefits without the payment of taxes to support it?

2. Does the creation of a junior college district by local or special legislation, which was limited to a specific geographical area and to that simple purpose, constitute an arbitrary and capricious classification, and result in a denial of equal protection of the laws; in a denial of due process of law to a taxpayer residing therein; or in a grant of a special privilege to those taxpayers not residing therein, particularly where the taxpayers residing in the district are subjected to special taxation, but are not conferred a special privilege, since their children could also attend a state supported junior college created pursuant to another general statute, or when the benefits for both the resident taxpayer and the non-resident citizen are the same?

3. Does the judgment of the Supreme Court of Colorado conform to the rationale enunciated by the Supreme Court of the United States in *Williams* v. *Mayor and City Council of Baltimore*, 53 S. Ct. 431, 289 U.S. 36, 77 L. Ed. 1015, even though at the time of the enactment of the local or special legislation there was a general law in effect and, at the same time the local or special legislation was enacted, the general assembly of the State of Colorado enacted another general law which established a state system of junior colleges to be controlled and financed by the State of Colorado?

STATEMENT OF THE CASE

Appellant is a taxpaying citizen and property owner

residing in a local junior college district which was created by a special bill enacted by the First Regular Session of the Forty-Sixth General Assembly of the State of Colorado as aforementioned (Senate Bill 405). This bill became effective on May 27, 1967. On August 24, 1967, appellant commenced an original action in the Thirteenth Judicial District of the State of Colorado challenging the constitutionality of Senate Bill 405 and the propriety of an organization election held under said bill on August 1, 1967.

Trial on these two issues was held on October 17, 1967. The Trial Court entered its Findings of Fact, Conclusions of Law and Decree (Appendix A pp 17-21) on November 14, 1967, which held that the election was properly conducted, but that Senate Bill 405 was unconstitutional because it violated Section 25, Article V, Constitution of Colorado, which prohibits special legislation where a general law can be made applicable.

Appellees thereafter filed a Motion for a New Trial in the Trial Court asserting that the Trial Court erred in its determination that Senate Bill 405 was unconstitutional, which motion was denied on February 16, 1968. Appellant did not file a Motion for New Trial regarding the Trial Court's determination that the election was properly conducted.

The Appellees appealed the Trial Court's ruling by filing a Writ of Error to the Supreme Court of Colorado on May 15, 1968. The Supreme Court of Colorado reversed the Trial Court on March 24, 1969. The opinion stated that whether or not a special law can be enacted where a general law is applicable is a matter of discretion with the legislature and will not be reviewed by the courts unless the legislature obviously abuses this discretion (Appendix B pp 23-29).

Appellant's Petition for Rehearing was denied by the Supreme Court of Colorado on April 14, 1969 (Appendix

D p 42). Appellant filed a Notice of Appeal to the Supreme Court of the United States with the Clerk of the Supreme Court of Colorado on July 10, 1969. Extension of time in which to docket an appeal in the Supreme Court of the United States has been granted by this Court until August 12, 1969. A Motion for Stay pending review by this Court was denied by the Supreme Court of Colorado on July 17, 1969.

There may be some question concerning whether Appellant raised the federal constitutional questions in the Supreme Court of Colorado. The record containing the complaint (wherein these questions were expressly raised) was before the Supreme Court of Colorado, and it relied heavily on the rationale expressed by Mr. Justice Cardozo, in *Williams* v. *Mayor and City of Baltimore,* 53 S. Ct. 431, 289 U.S. 36, 77 L. Ed. 1015 (Appendix B, pp 26-27).

The federal questions, namely, violations of Article XIV of the Constitution of the United States, were expressly presented to the trial court in addition to being set forth in the complaint (Appendix C, p 40). The trial court did not rule on the federal questions, but rendered a decision favorable to Appellant by holding Senate Bill No. 405 was unconstitutional as contravening Section 25, Article V, Constitution of Colorado, pertaining to enactment of a local or special law.

Under Colorado Rules of Civil Procedure, one must file a Motion For New Trial, wherein the specific allegations of error must be set forth, as a condition precedent to the appeal to the Supreme Court of Colorado. Only points set forth in the Motion For New Trial will be considered by the Supreme Court of Colorado. Appellant did not file a Motion For New Trial as the trial court decision was favorable. Appellees did file such a motion, but it was not affected by any such federal questions.

The Appellees, or Plaintiff in Error in the Supreme

Court of Colorado, were permitted to file an opening brief in that Court, and the Appellant, or Defendant-in Error in the Supreme Court of Colorado, was permitted to file an answer brief, which brief was confined to answering arguments of Appellees in the opening brief. The Appellees were then permitted to file a repiy brief. Because of the procedure, and more particularly, because the Appellant obtained a favorable judgment in the trial court, the Appellant did not raise the federal questions in his answer brief, even though, as previously indicated, the record with the complaint was before the Supreme Court of Colorado, and that Court relied on the rationale of Mr. Justice Cardozo in rendering its decision.

SUBSTANTIALITY OF FEDERAL QUESTIONS

The questions raised in this case are perhaps among the most vital equal protection of the laws questions affecting property owners since Congress enacted legislation in 1886 (24 Stat. 170) prohibiting the legislatures of the Territories from passing local or special laws "incorporating cities, towns, or villages". This case demonstrates the evils inherent in such local or special legislation in terms of equal protection of the laws against oppressive and arbitrary tax burdens imposed upon the property owners residing within the territorial limits of a junior college district created by local or special legislation.

The taxation on the property of Appellant arises entirely without regard to benefits being conferred on the Appellant or any other property owner residing within its territorial limits. Senate Bill No. 405 contained a provision to the effect that, after the district was formed, ". . . all other provisions of said article 23, Chapter 123, shall apply to the junior college district so established as apply to other junior college disriet organized under said article." All such junior college districts possess statutory authority to levy, or to cause to be levied, taxes

upon all real property located within their respective territorial limits. (Section 123-3-1 (2) and 123-3-2, Colorado Revised Statutes, 1963, as amended). Another statute provides, however, that in such a junior college district there can be only two classifications of students for tuition purposes, namely "in-state" and "out-of-state" students. Therefore, any child of a property owner residing outside the territorial limits of the subject junior college district, but within the territorial limits of Colorado, may attend Morgan County Junior College District upon payment of the same tuition charges made for children of Appellant, even though the former property owner pays no taxes whatsoever to support and maintain the college as does the Appellant. This clearly means that taxation is imposed upon Appellant without regard to benefits conferred upon anyone, whether they be, or be not a resident of Morgan County Junior College District.

Imposition of such arbitrary and oppressive tax burdens does not, however, terminate upon consideration of the foregoing point. Article 26, Chapter 124, Colorado Revised Statutes, 1963, as amended, was enacted, and became effective, at the same time as Senate Bill No. 405. Section 124-26-10 thereof establishes a state system of junior colleges, each such junior college to be supported entirely by the State of Colorado. Additional legislation enacted at the same time established several such state supported junior colleges in two different geographic locations within the State of Colorado. See Articles 24 and 25, Chapter 124, Colorado Revised Statutes, 1963, as amended. Those latter junior colleges have no territorial limits and do not have the power to levy local taxes since they are wholly supported by the State of Colorado. The objects of the state junior colleges are basically the same as those districts organized pursuant to Article 23, Chapter 123, Colorado Revised Statutes, 1963, as amended, and Morgan County Junior College District organized pursuant to Senate Bill No. 405. Appellant, therefore, is taxed to sup-

port the state junior colleges and, at the same time, is taxed to support the college of Morgan County Junior College District, even though the same benefits are available to Appellant at state supported junior colleges. Appellant recognizes that equal protection of the laws does not prevent a state from adjusting its legislation to differences in situations nor does it forbid classification. Such equal protection of the laws does require, however, that there be a real or substantial difference, having a reasonable relation to the subject of the particular legislation, and that the classification not be arbitrary. *Power Mfg. Co.* v. *Saunders,* 47 S. Ct. 678, 274 U.S. 490, 71 L. Ed. 1165.

Appellant submits that there is no real or substantial difference between his situation and the situation of any other property owner residing outside the territorial limits of Morgan County Junior College District and, therefore, the classification is arbitrary and capricious and constitutes invidious discrimination. If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefits conferred, the law cannot stand against the complaint of one so taxed in fact. (*Gast Realty & Investment Co.* v. *Schneider Granite Co.,* 36 S. Ct. 254, 240 U.S. 55, 60 L. Ed. 523).

It is apparent that Senate Bill No. 405 was not enacted to remedy an evil since, (a) the same junior college district could have been created under then existing general law, Article 23, chapter 123, Colorado Revised Statutes, 1963, as amended, (b) other similar junior college districts were already in existence pursuant to Article 23, Chapter 123, Colorado Revised Stautes, 1963, as amended, and (c) the general assembly at the same time enacted legislation creating several state junior colleges.

In *Colgate* v. *Harvey,* 56 S. Ct. 252, 296 U.S. 404, 80 L. Ed. 299, this Court stated as follows:

"But the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike . . . *The classification in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones. The test* to be applied in such cases as the present one is: *Does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts and then group, both of them occupying substantially the same relation toward the subject matter of the legislation? Mere difference is not enough.*" (Emphasis supplied)

For the foregoing reasons, Appellant submits that the Supreme Court of Colorado misconstrued and misapplied the rationale of Mr. Justice Cardozo in *Williams* v. *Mayor and City Council of Baltimore,* 53 S. Ct. 431, 289 U.S. 36, 77 L. Ed. 1015.

It cannot be logically contended that the general assembly of Colorado enacted Senate Bill No. 405 in the reasonable exercise of its police power. A general law had already been enacted and was in effect when Senate Bill No. 405 was enacted. In other words, the general assembly *had already* exercised its discretion and determined that a general law could be made applicable. Section 25, Article V, Constitution of Colorado provided that "In all other cases, where general law can be made applicable, no special law shall be enacted". In *Great Lakes Steel Corporation* v. *Lafferty,* 12 F. Supp. 55, which affirmed *Wayne County Board of Review* v. *Great Lakes Steel Corp.,* 57 S. Ct. 329, 300 U.S. 29, 81 L. Ed. 485, the Federal District Court stated in part:

"We are of the opinion that the statute under consideration is a local act, within the meaning of section

30 of Article 5 of the Michigan Constitution hereinabove quoted, and that, as this statute was enacted in a case where a general act could be made applicable, it contravenes the said section of the Constitution and is void . . .".

Appellant also submits that, in view of the recent decision of this Court in *Kramer* v. *Union Free School District*, 89 S. Ct. 1886, (June, 1969), a statute which infringes upon some right of a citizen protected by the Federal Constitution, does not enjoy the presumption of constitutionality. In 16A C.J.S. Classification of Localities, Section 494, it is stated as follows:

> "Legislation applicable only to certain areas of the state may be valid *provided it* applies to all persons similarly situated in such areas and *to all parts of the state where like conditions exist.*" (Emphasis supplied).

It may be contended by Appellee that the decision of the Supreme Court of Colorado is conclusive upon this Court since the former Court did interpret its own constitutional provision and the statute was within the scope of the police power of the state. This Court many years ago considered whether a state legislature is the exclusive judge of the propriety of police regulations when the matter is within the scope of its power, and dispelled such contentions in *Dobbins* v. *City of Los Angeles*, 25 S. Ct. 18, 195 U.S. 223, 49 L. Ed. 169, with the following:

> "To support this conclusion a citation is made from the opinion of this court in the case of *Munn* v. *Illinois*, 94 U.S. 113, 24 L. Ed. 77, to the effect that the legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power. The observations of Mr. Chief Justice Waite in that connection had reference to the fact of the particular case and were certainly not intended to declare the right of either the legislature or a city

council to arbitrarily deprive the citizen of rights protected by the Constitution, under the guise of exercising the police powers reserved to the states.

* * * *

"To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. . . . In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the Courts.

* * * *

"The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class.

* * * *

"The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution

of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law of the land."

In *Kansas City Southern Ry. Co. v. Road Improvement District Number 6*, 41 S. Ct. 604, 256 U.S. 658, 65 L. Ed. 1151, this Court stated in part as follows:

"*The statute under consideration prescribes no definite standard for determining benefits* from proposed improvements.

. . . .

". . . *We think the discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law. Benefits* from local improvements *must be estimated* upon contiguous property *according to some standard which will probably produce approximately correct general results.*" (Emphasis supplied)

And in *Truax v. Corrigan*, 42 S. Ct. 124, 257 U.S. 312, 66 L. Ed. 254, this Court considered the protection afforded by due process of law and stated:

"*The due process clause requires that every man shall have the protection of his day in Court*, and *the benefit of the general law*, . . . which proceeds not arbitrarily or capriciously . . . But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They, therefore embodied that spirit in a specific guaranty.

"The guaranty aimed at *undue favor and individual or class privilege* on the one hand, and at hostile dis-

crimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons even though all enjoyed the protection of due process.

"Thus the guaranty was intended to secure equality of protection not only for all but against all *similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class however limited of a personal or property right,—is just as clearly a denial of equal protection of the laws* to the latter class as if the immunity were in favor of, or the depreviation of right permitted worked against a larger class." (Emphasis supplied).

Appellant submits that those persons owning property outside the territorial limits of Morgan County Junior College District have been granted an immunity from taxation since they may enjoy the same benefits as those persons owning property located within its territorial limits. There is no real or substantial difference in this instance. The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for not lightly vacated, is the verdict of quiescent years. *Anderson National Bank* v. *Luckett*, 64 S. Ct. 599, 321 U.S. 233, 88 L. Ed. 692. It is undisputed that Senate Bill No. 405 was the first time that the general assembly of Colorado enacted a local or special law to create a quasi-municipal corporation as a body corporate with taxation powers, as distinguished from a mere state institution without territorial limits and wholly supported by the state.

In *Hurd* v. *Hodge*, 68 S. Ct. 847, 334 U.S. 24, 92 L. Ed. 1187, this Court considered the relationship between the Civil Rights Act of 1866 and the Fourteenth Amendment. We submit that this Court should now consider the

relationship between (a) federal legislation prohibiting the enactment of local or special laws (24 Stat. 170 and 14 Stat. 426), (b) the requirements of states to limit the enactments of local and special laws with constitutional provisions as a condition of being admitted to the Union, and (c) the Fourteenth Amendment.

For the reasons stated, Appellant respectfully submits that the questions presented in this appeal are so substantial and affect such multitudes of electors and taxpayers as to require plenary consideration, with briefs on the merits and oral arguments for their resolution by this Court.

Respectfully submitted,
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APPENDIX A
DECISION OF THE TRIAL COURT

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF WASHINGTON AND
STATE OF COLORADO
CIVIL ACTION NO. 3985

CHARLES L. JOLLY,
Plaintiff,

vs.

MORGAN COUNTY JUNIOR COLLEGE DISTRICT, MARIAN LOCKWOOD, as Supt. of Schools, Morgan County,

BERTHA HEID, as Supt. of Schools, Adams County,

PAUL N. LODWICK, as Supt. of Schools, Weld County, and

RUTH HIGINBOTHAM, as Supt. of Schools, Washington County,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE

THIS MATTER having come on for trial this 17th day of October, A.D., 1967, the Court having heard the evidence and the arguments of counsel and having had the advantage of briefs filed on behalf of the respective parties, the Court now being sufficiently advised in the premises, FINDS:

That the plaintiff, Charles L. Jolly, has such an interest in the subject matter of the action as a property owning, taxpaying elector as makes him a proper party plaintiff.

Concerning the issues presented relative to the conduct of the election, the Court finds that the requirements of the statutes were met and that such deviations as there may have been were not substantial, and in no way prejudiced the rights of the plaintiff or any other elector.

The vital determining issue is the constitutionality of the Act referred to as S.B. 405. Except as limited by the Constitution, the legislative power is plenary. Article V, Section 25 limits the area of special or local legislation. Numerous prohibitions appear, none of which are applicable to the instant case. "Common Schools" as that term is there used, does not contemplate Junior Colleges, though the same may, in other context, be considered public schools. The crux lies in the application of the general statement at the end of the Section: "In all other cases, where a general law can be made applicable, no special law shall be enacted." S.B. 405 is obviously and admittedly a special or local law. The question is, can, or could a general law be made applicable? The Court is aware of the rule requiring it to be persuaded beyond a reasonable doubt before declaring a statute unconstitutional. The Court also notes the rule that the judiciary will not invade the discretionary power in the Legislature in determining the advisability or necessity for special legislation, except in clear cases.

There is nothing in the evidence, nor within the realm of which the Court may take judicial notice, nor within the wording of the statutes involved, nor their legislative history or obvious intent, that hints or indicates in any way the existence of circumstances requiring special legislation rather than general law in this instance. All logical conclusions compel a contrary opinion.

The instant case is clearly distinguishable from prior Acts designating sites for Junior Colleges at Grand Junction and Trinidad or Community Colleges at Denver and El Paso County.

C.R.S. 123-23 provides a general and complete statutory procedure for the orderly and planned organization and operation of Junior College Districts as corporate entities. Chapters 242, 243 and 244, S.L. 1967 provide the counterpart type of general legislation for the establishment and operation of a system of State Junior Colleges and Community Colleges. These last mentioned Acts were passed at the same term, if not on the same date as S.B. 405. The Legislature had them in contemplation at the time S.B. 405 was passed. The words appearing in Section 1 (2) of S.B. 405 appear verbatim in Sections 2 of both Chapters 243 and 244, S.L., 1967. The Legislature makes it apparent that the school contemplated by S.B. 405 is not organized under the provisions of Chapters 242, 243 or 244. This is true even though provision is made by way of exception for its possible entry into the general system. This is, to no small degree, special legislation. However, the constitutionality of Chapter 242 is not here in issue. This Chapter is of interest primarily as it clearly indicates legislative policy to proceed in this area by general law for an orderly development and a well planned system in the educational areas involved, as is surely contemplated by the Constitution.

While the terminology of Section 1 (2) of S.B. 405 does not follow the wording of C.R.S. 1963, 123-23-2, the Act specifically provides that with the exception of those provisions for organization, namely 123-23-3, 4 and 5, "All other provisions of said Article 23 of Chapter 123, shall apply to the junior college district so established as apply to other junior college districts organized under said article." It is crystal clear that S.B. 405, after having accomplished its purpose of creating, by exception, to a general law, a Junior College District and providing, by exception to a general law for its organization, serves no further purpose. It does not purport to establish another type of educational institution. If such a construction

should be contended it would surely run afoul of the provisions of Article V, Section 24 of the Constitution.

The application of Article V, Section 24 has not been argued by counsel, nor mentioned in their briefs. However, consideration of it is naturally prompted upon analysis, and such consideration serves only to reinforce the conclusion of the Court.

The finding that a general law was, and could be applicable, is inescapable. A special law was not necessary. Education beyond the common schools, in schools supported by public funds, is a matter of Statewide concern. General laws in this area serve the public welfare. The result that would attend the sanction of special legislation such as here proposed is the very evil sought to be prohibited by the Constitution in Article V, Section 25.

THE COURT THEREFORE FINDS that S.B. 405 is unconstitutional, and the Clerk is hereby ordered and directed to enter judgment for the plaintiff and against the defendants, vacating and setting aside ab initio all actions that may have been taken by the various County Superintendents, parties defendant to this action toward the organization of said purported Morgan County Junior College District, and further setting aside and holding for nought the election purporting to organize said Junior College District, and further setting aside and holding for nought the election purporting to elect a Junior College Committee to control and manage said purported Junior College District, provided, however, that said County Superintendents and the members of the purported Junior College Committee shall abide the further orders of the Court as may be necessary to effectuate the intent of this Decree.

IT IS FURTHER ORDERED that said purported Morgan County Junior College District be, and hereby is,

dissolved ab initio, and to such extent as said purported District may have existed as a de facto corporate entity, shall remain subject to the further jurisdiction of this Court for compliance with such further and additional orders as may be necessary to effectuate the intent of this Decree.

IT IS FURTHER ORDERED that the plaintiff have and recover against the defendants his costs herein laid out and expended.

Counsel is granted ten days within which to file a motion for new trial.

Done this 14 day of November, A.D., 1967.

Francis L. Shallenberger
District Judge

APPENDIX B

DECISION OF THE SUPREME COURT OF COLORADO

NO. 23582

MORGAN COUNTY JUNIOR COLLEGE DISTRICT; MARIAN HOCKWOOD as Superintendent of Schools, Morgan County; BERTHA HEID, as Superintendent of Schools, Adams County; PAUL N. HODWICK, as Superintendent of Schools, Weld County; and RUTH HIGINBOTHAM, as Superintendent of Schools, Washington County,
Plaintiffs in Error,

v.

CHARLES L. JOLLY,
Defendant in Error.

MARCH 24, 1969

Error to the District Court of the County of Washington
Hon. Francis L. Shallenberger, Judge

EN BANC — JUDGMENT REVERSED

Duke W. Dunbar, Attorney General,
John P. Moore, Deputy Attorney General,
John E. Bush, Assistant Attorney General,
E. Ord Wells,
Doyle T. Johns, Jr.,
Attorneys for Plaintiffs in Error.

John W. Lentz,
Albert W. Gebauer,
Attorneys for Defendant in Error.

MR. JUSTICE HODGES delivered the Opinion of the Court.

This case concerns the constitutionality of the 1967 statute creating the Morgan County Junior College District, subject to approval by electors of the district. Colo. Sess. Laws 1967, ch. 241 (Senate Bill 405). This statute will be referred to as Senate Bill 405.

The parties appear here in reverse order from their alignment in the trial court. The plaintiffs in error, who were defendants below, seek reversal of the trial court's judgment that Senate Bill 405 is unconstitutional.

The main provisions of Senate Bill 405 are as follows:

(1) The Morgan County Junior College District is created, subject to approval by the electors of the district.

(2) The District is comprised of 5 school districts located in 4 different counties.

(3) A District organization election is required to be held, with a favorable majority vote being necessary to establish the District.

(4) The objects of the junior college are "to provide and offer educational programs to meet the occupational needs of youth and adults in technical and vocational fields and to provide two-year transfer educational programs to qualify students for admission to the junior year at colleges and universities."

(5) If the District's electors approve establishment of the junior college, then the general statutory provisions relating to junior colleges, Article 23 of Chapter 123, C.R.S. 1963, as amended, are applicable to the Morgan County Junior College District.

The election was held, and the electors approved the organization of the Morgan County Junior College District by a favorable vote of more than 2 to 1.

This writ of error stems from a suit which sought to nullify the establishment of the Morgan County Junior College on two grounds:

1) That the District organization election was invalid; and,

2) That Senate Bill 405 is unconstitutional.

The trial court upheld the validity of the election, but declared that Senate Bill 405 is unconstitutional.

I.

Article 23 of Chapter 123, C.R.S. 1963, originally enacted in 1937 and subsequently amended, is the general law relating to the establishment of junior colleges. Senate Bill 405, enacted in 1967, is a special law providing solely for the establishment of the Morgan County Junior College. Colo. Const., art. V, §25, prohibits special laws in certain specific cases and, "In all other cases where a general law can be made applicable . . ."

The trial court concluded that none of the specific prohibitions against special laws enumerated in art. V, §25, are applicable to the instant case, and we agree with that conclusion. The sole question raised, therefore, is this: Was the existing general junior college law applicable, within the intendment of art. 5, §25 of the Colorado Constitution, so as to preclude valid enactment of the special law, Senate Bill 405?

It is for the legislature, and not the court, to make the initial answer to this question. Although there is divergent precedent in Colorado on the issue posed by this writ of error, we now resolve that divergency. We declare the applicable rule in this jurisdiction to be as follows: Whether a general law cannot be made applicable, so as to permit thereby a special law, is a discretionary determination to be made by the legislature,

which is not reviewable by the court unless a palpable abuse of discretion is shown. This is the view espoused in *Carpenter v. People*, 8 Colo. 116, 5 P. 828, *Coulter v. Routt County*, 9 Colo. 258, 11 P. 199, and *McClure v. People*, 111 Colo. 271, 141 P. 2d 685. To the extent that they conflict with the above stated rule, *Brown v. City of Denver*, 5 Colo. 305, 3 P. 456 and *Rhinehart v. Denver and Rio Grande R.R. Co.*, 61 Colo. 369, 158 P. 149 are hereby overruled.

We have here adopted the modern view. 2 *Sutherland, Statutory Construction*, §2103 (3d ed.) We conceive it to be fairer and more reasonable than the inflexible rule that the legislative determination of the inapplicability of a general law is conclusive. Such inflexibility is neither practical for dealing with unforeseen exigencies, nor consonant with justice. In support of our holding that the necessity for a special law is within the legislative discretion, subject to court interference only upon a showing of clear abuse, we adopt the rationale of Mr. Justice Cardozo in *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015:

> "Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so, the correcting statute may be as narrow as the mischief. The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. . . . If special circumstances have developed, and exemp-

stances of such a nature as to call for a new rule, the special act will stand."

We have carefully reviewed the record in the instant case and find no showing of an abuse of legislative discretion, either palpable or otherwise. We therefore hold that there is no basis in law for a judicial declaration that Senate Bill 405 contravenes Colo. Const. art. V, § 25, and that the presumption of constitutionality prevails.

II.

In making our determination in this case, we are not unmindful of the following contentions of the plaintiffs in error:

(1) That the trial court erred in imposing upon plaintiffs in error, defendants below, the burden of proving that the legislature had properly exercised its discretion and authority; and,

(2) That the trial court erred in rejecting the exhibits proffered by plaintiffs in error to show that an administrative action had blocked applicability of the special law.

We agree with both contentions and deem it necessary to briefly comment on these errors.

The burden of proving that Senate Bill 405 was not an abuse of the legislative discretion was tantamount to imposing the burden of proving constitutionality upon the party upholding the statute. This is plainly erroneous. These are well established principles of constitutional law: (1) A duly enacted statute is presumptively constitutional; (2) The party attacking its validity carries the burden of proof; and, (3) Such party must establish clearly and beyond a reasonable doubt that the statute is unconstitutional. *Plank Oil Co. v. Tennessee Gas Transmission Co.*, 141 Colo. 551, 349 P.2d 1005; *Thiele v. City and County of Denver*, 135 Colo. 442, 312 P.2d 788; *Alaska*

v. Dunbar, 135 Colo. 172, 309 P.2d 581; *Eachus v. People*, 124 Colo. 454, 238 P.2d 885, *appeal dismissed*, 342 U.S. 903, 72 S.Ct. 362, 96 L.Ed. 698; *Gettmann v. Board of Commissioners of Morgan County*, 122 Colo. 185, 221 P.2d 363.

The trial court excluded as exhibits letters from the State Board of Education which showed that, *prior to enactment of Senate Bill 405*, the Board had rejected the proposal for establishing a junior college in Morgan County under the general law. Plaintiffs in error made a proper offer of proof with respect to these exhibits, which are incorporated in the record. We deem it proper under these circumstances to comment upon the content and import of the letters. 5 C.J.S. *Appeal and Error*, 1490; *Koon v. Sampson*, 61 Wyo. 198, 159 P.2d 356.

The *general* junior college law prescribes two criteria for the State Board of Education's approval or disapproval of the formation of a junior college district. The proposed district must have an assessed valuation of at least 60 million dollars and at least 400 students in the 12th grade. The trial court admitted evidence showing that the proposed Morgan County Junior College District met these criteria at the time application was made to the Board. The State Board of Education withheld its approval, without mention of *existing* statutory criteria. Instead, the Board declared a moratorium on approving any new junior colleges, because it was formulating new criteria to present to the legislature.

We view this administrative policy to be an unwarranted frustration of the legislative intent. The legislative mandate cannot be ignored and set for naught by the device of an administrative moratorium. And the unfortunate applicant was left in limbo, without an appealable ruling of disapproval. Patently, Senate Bill 405 was necessary to meet the exigencies created by the State Board of Education, and hence, was not within the constitutional prohibition that no special law can be enacted where a gen-

eral law can be made applicable. 82 C.J.S. *Statutes* § 359; 50 Am. Jur. *Statutes* § 351. The rejected exhibits would have established the propriety of, and indeed the compulsion for, the legislative determination that the general junior college law could not be made applicable to the Morgan County Junior College District.

For the reasons herein stated, Senate Bill 105, enacted Colo. Sess. Laws 1967, ch. 241, is declared to be unconstitutional, and we therefore, reverse the trial court's judgment.

Judgment reversed.

APPENDIX C

COMPLAINT

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF WASHINGTON
AND STATE OF COLORADO

Civil Action No. 3985

CHARLES L. JOLLY,
Plaintiff,

-vs-

MORGAN COUNTY JUNIOR COLLEGE DISTRICT; MARIAN LOCKWOOD as County Superintendent of Schools, County of Morgan and State of Colorado; BERTHA HEID as County Superintendent of Schools, County of Adams and State of Colorado; PAUL M. LODWICK as County Superintendent of Schools, County of Weld and State of Colorado; and RUTH L. HIGINBOTHAM as County Superintendent of Schools, County of Washington and State of Colorado, and RAYMOND A. HALLER, RUTH A. BAIN, WILLIAM J. MELLINGER, WILLARD K. MEES, and EILEEN SEGELKE as members of Junior College Committee for Morgan County Junior College District, County of Morgan and State of Colorado,
Defendants.

SECOND AMENDED INTENTION TO CONTEST ELECTION AND COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW, the above named Plaintiff and Contestor, by and through his attorneys, and for a claim for relief against the above named Defendants-Contestees, states that he intends to contest the hereinafter mentioned election, complains, alleges, and avers, as follows:

FIRST CLAIM FOR RELIEF
(Election Contest)

I.

THAT the Plaintiff-Contestor herein was a qualified taxpaying elector of School District No. R-104, County of Washington, State of Colorado, at the time of the purported election hereinafter mentioned, and that Plaintiff-Contestor was a qualified taxpaying elector of the territory comprising the purported Morgan County Junior College District at the time of the purported election hereinafter mentioned, and that the Plaintiff-Contestor is now a qualified taxpaying elector in said School District R-104, and in said purported Morgan County Junior College District.

II.

THAT the First Regular Session of the forty-Sixth General Assembly of the State of Colorado enacted Senate Bill No. 405, entitled "Creating the Morgan County Junior College District, Subject to Approval of the Establishment Thereof by The Qualified Taxpaying Electors of Said District."

III.

THAT said Senate Bill No. 405 became effective as a law of the State of Colorado when signed by the Governor of the State of Colorado, on or about May 27, 1967.

IV.

THAT said Senate Bill 405 purported to create Morgan County Junior College District as a legal entity when it became effective as a law of the State of Colorado,

but that the establishment thereof was subject to the approval of the qualified taxpaying electors of the purported District.

V.

THAT said Senate Bill 405 purportedly established the territorial limits of said Morgan County Junior College District in a manner so as to include all of the territory within School District No. Re-20, Counties of Morgan and Weld, State of Colorado; School District No. Re-3, County of Morgan, State of Colorado; School District No. Re-2, Counties of Morgan and Washington, State of Colorado; School District No. R-104, County of Washington, State of Colorado; and School District No. Re-50, Counties of Morgan, Weld, and Adams, State of Colorado.

VI.

THAT said Senate Bill No. 405, purportedly directed the above named Defendant, Marian Lockwood, as Superintendent of Schools of County of Morgan and State of Colorado, to "forthwith give notice that the question of approving the organization" of said Junior College District would be submitted to a vote of the qualified taxpaying electors of said District within one hundred twenty days after the effective date of said Senate Bill No. 405.

VII.

THAT on or about August 1, 1967, the above named Defendants, county superintendents of schools, purportedly submitted to the qualified taxpaying electors of said purported Morgan County Junior College District, at an election held for that purpose, the above mentioned question.

VIII.

THAT the results of said purported election were canvassed on or about August 14, 1967, and the canvass reflected a total of 1,915 votes for the plan of organization and 880 votes against the plan of organization.

IX.

THAT the aforementioned canvass of votes for the purported election also reflected that thirty-one (31) votes were cast for the plan of organization in School District No. R-104, and that 83 votes were cast against the plan of organization in School District No. R-104.

X.

UPON information and belief, Plaintiff alleges that the following particular causes for the contest resulted in the purported election being void and as not expressing the true will of the qualified taxpaying electors, to-wit:

(a) There was an insufficient number of polling places established within the purported Morgan County Junior College District for the convenience of the qualified taxpaying electors in order to obtain the true expression thereof on the question submitted.

(b) The Defendants, county superintendents of schools, failed, neglected, or refused to give to the qualified electors of their respective counties' residents within the area of the purported District, notice that at the next regular or special meeting for the election of members of the Board of Education, the question of organizing a junior college district would be submitted to the qualified voters of the respective school districts, contrary to Section 2, of said Senate Bill No. 405, and Section 123-23-5, C.R.S. 1963.

(c) That if any notice referred to above in paragraph X (b) was given, it was not given at least twenty (20) days before the aforementioned regular or special meeting, nor was it posted as required by 123-23-6, C.R.S. 1963.

(d) That the secretaries of the foregoing School Districts failed, neglected, or refused to cause written or printed notices of the purported election to be given to the qualified taxpaying electors of their respective School Districts, contrary to Sections 123-23-6, 123-11-3, 123-31-13, and 109-1, C.R.S. 1963.

(e) That if any notice referred to above in X. (d) was given, said notice did not state that the time or place for said election was to be the same as that for the election of members of the Board of Education, contrary to Section 123-23-6, C.R.S. 1963.

(f) That if any notice referred to above in X. (d) was given, said notice was not posted in at least three public places in each of the aforementioned School Districts and counties, one of which shall be the general offices of the School District at the school house, contrary to Section 123-23-6, C.R.S. 1963.

(g) That the Defendants, county superintendents of schools, did not agree on the time for said purported election, contrary to Section 123-23-6, C.R.S. 1963.

(h) That if any notice referred to above, was given, said notice of the purported election did not contain any provision relating to absentee balloting, and that absent voters, otherwise qualified to vote at said purported Election, were disfranchised from voting.

(i) That if any notice referred to above, was given, said notice for the purported election did not specify with a reasonable degree of certainty the qualifications for eligibility to vote at said purported election.

(j) That if any notice referred to above, was given, said notice for the purported election did not set forth the precinct boundaries in a manner to sufficiently inform the voters of their residence therein and of their respective polling places.

(k) That if any notice referred to above, was given, said notice purportedly specified precincts which included territory in more than one county, contrary to Section 123-23-13, C.R.S., 1963, and included precincts which did not consist of one or more whole general election precinct wherever practicable, contrary to Section 123-11-6, C.R.S. 1963.

(d) That Defendants, county superintendents of schools, and the Boards of Education of said five school districts included in said purported Junior College District, failed, neglected, or refused to divide said purported Junior College District into election precincts, and failed, neglected, or refused to designate the polling places therein a reasonable time prior to said purported election, and the secretary of each of said Boards of Education failed, neglected, or refused to certify to the County Clerk of each County the description of the school election precincts, contrary to Sections 123-11-6, 123-23-13, and 123-31-11, C.R.S. 1963.

(e) That Defendants, county superintendents of schools, failed, neglected, or refused to number the election precincts consecutively, contrary to Sections 123-11-6 and 123-31-11, C.R.S. 1963.

(f) That any notice which may have been published for the purported election was not published in newspapers having general circulation in each of the school districts and counties, and for the number of publications required by Sections 123-11-2, 123-23-6, 123-31-13, and 109-1, C.R.S. 1963.

(g) That the qualified taxpaying electors of the purported Morgan County Junior College District were not given sufficient opportunity to register to vote at said purported election pursuant to Sections 123-11-10, 123-23-7, and 123-31-6, C.R.S. 1963.

(h) Qualified taxpaying electors whose names were omitted from the registration list were not given an opportunity to subscribe to an oath, contrary to Section 123-11-11, C.R.S. 1963.

(i) The president, secretary, and treasurer of the above mentioned respective school districts, or other qualified electors appointed by them, did not serve as election judges, contrary to Section 123-23-7, C.R.S. 1963.

(r) The election judges were not furnished a true or reasonably correct list of the eligible registered voters, arranged in alphabetical order, for each election precinct, contrary to Sections 123-11-2 (3) and 123-31-6 (3), C.R.S. 1963.

(s) That paper ballots were used in said purported election and marked in a manner contrary to Section 8, Article VII, Constitution of Colorado.

(t) That the purity of the ballot boxes was not preserved between the time of the election and the canvass of the votes and between the time of the canvass of the votes and the filing of this action, contrary to Section 123-23-8, C.R.S. 1963.

(u) That persons were allowed to vote who were not qualified, taxpaying electors as required by Sections 123-23-7, 123-11-10, 123-11-1 (4), and 123-31-6, C.R.S. 1963.

(v) That Defendants, county superintendents of schools, in canvassing the results of said purported election, unlawfully went behind the certificates of the respective election judges to examine the ballots.

(w) That Defendants, county superintendents of schools, failed, neglected, or refused to canvass the votes within their respective counties within ten (10) days after said election, contrary to Section 123-23-9 (1), C.R.S. 1963.

(x) That said purported district does not have an assessed valuation of sixty million dollars or more, and a twelfth grade school population of four hundred or more, as required by Section 123-23-3, C.R.S. 1963, and that the State Board of Education twice refused to approve said purported District, as required by Section 123-23-3, C.R.S. 1963.

(y) That said purported election was unlawfully financed by contributions from the respective school districts within the purported Junior College District.

XI.

THAT the actions of Defendants, county, superintendents of schools, relating to the purported election as set forth in paragraph X hereof, constituted malconduct and that such actions essential in not permitting the qualified taxpaying electors of the purported Morgan County Junior College District to freely express their will on the question submitted

XII

THAT the Defendants, county superintendents of schools, failed, neglected, or refused to comply with the mandatory legislative provisions of the law as set forth in paragraph X hereof, and as a result thereof, the true and free expression of the qualified taxpaying electors was not obtained at said purported election

XIII

THAT the result of the purported election would have been changed if the Defendants, county superintendents of schools, had fully complied with the laws of the State of Colorado, as hereinabove set forth

WHEREFORE, Plaintiffs pray for judgment and decree of this Court as follows:

1

That paragraphs I through XIII of the First Cause of Action as hereinabove set forth are hereby incorporated into the Second Cause of Action as if fully set forth herein

II

THAT the aforementioned Senate Bill No. 161 is unconstitutional and void and of no effect for the following reasons:

That said Senate Bill is an unreasonable grant of special privileges, franchises and immunities which the General

tution of a school district of convenient size as required by Article IX, Section 4 of Constitution of Colorado.

III

THAT the aforementioned Senate Bill No. [illegible] is unconstitutional and void and of no effect because it deprives Plaintiff of life, liberty, and property without due process of law, and denies Plaintiff equal protection of the laws in contravention of Article XIV, Constitution of the United States.

IV

THAT Article 21, of Chapter 123, Colorado Revised Statutes, 1963, is unconstitutional and void and of no effect because it contravenes Article VII, Section 1, Article IX, Section 10, Article X, Section 3, Constitution of Colorado.

WHEREFORE, Plaintiff [illegible] prays that this Court [illegible] from the Court as follows:

1. To declare that the creation and organization of Morgan County Junior College, District is void and void and of no effect.

2. To declare that the purported election held on the 5 August 6, 1963, relating to the establishment of Morgan County Junior College District is null and void and of no effect.

3. That the aforementioned Senate Bill No. [illegible] unconstitutional and void and of no effect.

4. That Article 21, Chapter 123 of Colorado Revised Statutes, 1963, is unconstitutional and void and of no effect.

5. That the [illegible] of Morgan County Junior College District be forever enjoined.

6. That such other and further relief be granted as to the Court may seem proper in the premises.

APPENDIX D

ORDER DENYING PETITION FOR REHEARING

IN THE SUPREME COURT OF THE STATE OF COLORADO

MORGAN COUNTY JUNIOR COLLEGE DISTRICT; MARIAN LOCKWOOD as Superintendent of Schools, Morgan County; BERTHA REID, as Superintendent of Schools, Adams County; PAUL N. LODWICK, as Superintendent of Schools, Weld County; and RUTH HIGINBOTHAM, as Superintendent of Schools, Washington County,

Plaintiffs in Error,

23582

vs.

CHARLES L. JOLLY,

Defendant in Error.

Error to the District Court of Washington County.

The Court having considered the petition of the defendant in error for a rehearing in the above cause, and being sufficiently advised in the premises, it is this day ordered that said petition be, and the same hereby is, denied.

BY THE COURT, EN BANC, April 14, 1969.